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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CITY OF NORTH OLMSTED, OHIO
PETITIONER,

vs.

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ATTORNEYS FOR PETITIONER
COUNSELS OF RECORD

MARCH, 1983

QUESTION PRESENTED

Whether the Sixth Circuit Court of Appeals affirmance of the District Court's grant of Summary Judgment to the Greater Cleveland Regional Transit Authority (GCRTA), a political subdivision of the State of Ohio, on Petitioner, City of North Olmsted, Ohio's claim that GCRTA was engaged in anti-competitive conduct in violation of the Sherman Antitrust Act, based upon the "State action" exemption was consistent with this Court's decision in Community Communications Co. v. Boulder 70 L.Ed. 2d 810 (1982) in light of the relevant statutes and constitutional provisions of the State of Ohio

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I. The decision below is in conflict with the applicable decisions of this Court regarding the requirements of a "state action" exemption from antitrust liability as expressed most recently in Community Communications v. City of Boulder 70 L.Ed. 2d 810.

II. The decision below presents an important federal question of antitrust liability between local and regional governmental bodies which is of nationwide importance and public concern.

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GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, City of North Olmsted, Ohio, respectfully prays that the Honorable Supreme Court of the United States issue a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on December 2, 1983.

Opinions Below

Sixth Circuit, Court of Appeals: The opinion of the court below in this case (Appendix A, infra, page 1) is reported at 722 F. 2d 1284.

District Court, Northern District of Ohio, Eastern Division: The opinion of the District Court in this case (Appendix A, infra, page 14) is unreported.

In a related matter, G.C.R.T.A. v. City of Maple Heights & City of North Olmsted, pursued through the Courts of the State of Ohio, the following opinions have been rendered:

Ohio Supreme Court: The dismissal of the Ohio Supreme Court, in the above case (Appendix A, infra, page 21) is unreported.

Cuyahoga County Court of Appeals, Eighth District: The opinion of the Ohio Court of Appeals in the above case (Appendix A, infra, page 23) is unreported.

Cuyahoga County Court of Common Pleas: The opinion of the Ohio Court of Common Pleas, in the above case (Appendix A, infra, page 35) is unreported.

Jurisdiction

The judgment of the Sixth Circuit Court of Appeals (Appendix A, infra, page 1) was entered on December 2, 1982. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 United States Code Section 1254(1).

Constitutional and Statutory Provisions Involved

1. 28 United States Code Section 1254(1). (Appendix B, infra, page 1).
2. Section 2 of the Sherman Anti-Trust Act, 15 United States Code Section 2. (Appendix B, infra, page 1).
3. Article XVIII, Section 4 of the Ohio Constitution (Appendix B, infra, page 2).

4. Sections 306.30 et seq. of the Ohio Revised Code (Appendix B, infra, page 3).

5. Section 306.70 and 306.71 of the Ohio Revised Code (Appendix B, infra, page 30).

Statement of the Case

This case involves a claim by the City of North Olmsted, Ohio, the owner and operator of the North Olmsted Municipal Bus Line (NOMBL), that, during the period from 1977 to the present, the Greater Cleveland Regional Transit Authority (GCRTA) also the owner and operator of a bus line, attempted to monopolize the bus transportation market in Cuyahoga County, Ohio, and otherwise engaged in anti-competitive conduct in violation of Section 2 of the Sherman Antitrust Act (Appendix B, p.1), 15 U.S.C. Section 2. In the District Court below, as subsequently affirmed by the Sixth Circuit, Summary Judgment was granted to GCRTA on North Olmsted's antitrust claim based upon the affirmative defense of the "state action" exemption from federal antitrust law liability. It is from the misapplication of this Court's decisions in the area of the "state action" exemption and the existence of a conflict among the Circuits in this area that this

Petition is brought before the Court.

The factual background of this case is clear and for the most part uncontested by the parties. The Petitioner, City of North Olmsted, Ohio, an Ohio municipality located west of Cleveland, in Cuyahoga County, has owned and operated the NOMBL since 1931 providing bus service within the City and surrounding cities and townships. Petitioner's authority to own and operate such a service is expressly granted in Article XVIII, Section 4 of the Ohio Constitution which was enacted as a "home rule" amendment in 1912. (Appendix B, p.2).

In 1974, the Ohio General Assembly provided a mechanism for the voluntary creation of new State political subdivisions through joint legislative action of counties, municipalities or townships for the purpose of the operation and funding of regional transit authorities pursuant to Ohio Revised Code Section 306.30 et seq. and 306.70 and .71. Among the powers granted to such

regional transit authorities was the power to own and operate bus lines within the territorial boundaries of the counties, municipalities or townships which created the transit authority or which voluntarily joined therein.

On December 30, 1974, the City of Cleveland, Ohio, and Cuyahoga County, Ohio, created by joint legislative action, the Greater Cleveland Regional Transit Authority. This action, engaged in by Cuyahoga County and only one of the more than fifty cities, villages and townships in the county, led to the operation of a bus line throughout the countywide region. Thereafter, in 1975 GCRTA entered into operating agreements with all other existing public and private bus lines providing for coordinated service in exchange for subsidization of the existing line by GCRTA through the passage of a tax levy.

The City of North Olmsted entered into an operating agreement with GCRTA on October 5, 1975, for an initial two year term. The

agreement was subsequently renewed for shorter terms at GCRTA's insistence and finally expired March 5, 1980, when, as alleged in the courts below, GCRTA refused to renew in an effort to force North Olmsted into selling its bus line to GCRTA, knowing that the City's bus line could not continue to compete without subsidization from GCRTA's funding sources.

In an attempt to determine the propriety of GCRTA's refusal to renew, the City of North Olmsted, the City of Maple Heights which was similarly affected and GCRTA brought actions for declaratory relief in the Cuyahoga County Court of Common Pleas. The parties sought a declaration of whether, under the Ohio Constitution and relevant state statutes, GCRTA was required to renew its operating agreements with the other bus lines and if not whether GCRTA was empowered to operate competing lines within the boundaries of political subdivisions that neither created or voluntarily joined in the regional authority. (See, Greater Cleveland Regional Transit

Authority v. City of Maple Heights and City of North Olmsted (1980) Consolidated Case Nos. 999314, 999315 and 999358; (Appendix A, infra, page 31). The Court of Common Pleas held that under State law, GCRTA was not obligated to renew and was not prohibited from operating parallel and competing systems. (Id.

The decision was subsequently affirmed by the Cuyahoga County Court of Appeals in Greater Cleveland Regional Transit Authority v. City of Maple Heights, et al. (1981) Consolidated case nos. 42982, 43117 and 43419. (Appendix A, infra, page 20). Leave to further appeal to the Ohio Supreme Court was denied in Greater Cleveland Regional Transit Authority v. City of Maple Heights, et al. case no. 81-1087 (1981). (Appendix A, infra, page 18).

The present action was then commenced by Petitioner, City of North Olmsted, Ohio, in the United States District Court for the Northern District of Ohio on October 16, 1981, when a Complaint was filed asking for Injunctive and Other Relief against GCRTA. The

District Court's original jurisdiction to hear cases alleging violations of the Sherman Antitrust Act, 15 USC, was properly invoked by Petitioner.

Petitioner alleged that GCRTA had, from 1977 to the present violated Section 2 of the Sherman Antitrust Act (Appendix B, infra, page 1) by attempting to monopolize the bus transportation market of Cuyahoga County, Ohio. It was further alleged that GCRTA had engaged in various acts of anti-competitive conduct including, inter alia, negotiating the renewal of operating agreements with local bus operators in bad faith, systematically absorbing the operations of small local lines, and refusing to share with local operators state and federal grants and tax revenues which effectively prevented them from continuing their operations. Petitioner also alleged that GCRTA's monopolistic practices were in direct violation of Article XVIII, Section 4 of the Ohio Constitution which expressly grants Ohio municipalities the right to operate public

utilities, such as bus lines. (Appendix B, infra, page 2).

In its prayer for relief, Petitioner asked that GCRTA be restrained from operating a federal or state subsidized bus line within the bounds of its City and that GCRTA be ordered to negotiate with Petitioner, in good faith, for the renewal of the prior operating agreement which would protect the Petitioner's right to operate a local bus line.

In answer, GCRTA filed a Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment. GCRTA's Motion was based on the affirmative defenses of res judicata and collateral estoppel as to Petitioner's Ohio Constitution claim and the defense of the Parker "state action" exemption from federal antitrust liability as to Petitioner's Sherman Antitrust Act claims. The District Court granted GCRTA's Motion for Summary Judgment on the basis of the affirmative defenses raised therein. (See, City of North Olmsted v. Greater Cleveland

Regional Transit Authority 722 F. 2d 1284 (1983)). (Appendix A, infra, page 1).

Petitioner, City of North Olmsted, Ohio, now petitions this Court to issue a writ of certiorari to the Sixth Circuit Court of Appeals for a review of this significant federal question.

Argument for Granting a Writ of Certiorari

1. THE DECISION BELOW IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT REGARDING THE REQUIREMENTS OF A "STATE ACTION" EXEMPTION FROM ANTITRUST LIABILITY AS EXPRESSED MOST RECENTLY IN COMMUNITY COMMUNICATIONS v. CITY OF BOULDER 70 L.ED. 2d 810 (1982).

Petitioner, City of North Olmsted, Ohio, requests that this Court issue a writ of certiorari to the Sixth Circuit Court of Appeals to determine if that Court, as well as others, has correctly applied the test articulated by this Court in Community Communications v. City of Boulder 70 L.Ed. 2d 810 (1982) in regard to the "state action" exemption from antitrust liability. The misapplication of the Community Communications test has not only seriously prejudiced Petitioner, but has also

seriously undermined the standard which this Court has established in its evolution of the "state action" doctrine, following its inception in Parker v. Brown 317 U.S. 341 (1943).

The lower courts, in this case, have entered Summary Judgment in favor of Respondent, Greater Cleveland Regional Transit Authority, a political subdivision of the State of Ohio, against Petitioner on its Sherman Antitrust Act claims. The actions of the lower courts were based on their view that Respondent was entitled to exemption because its conduct was the result of state action as defined in Community Communications. This view clearly and improperly broadens the "state action" exemption doctrine beyond the limits established in this Court's past decisions, as applied to the relevant facts in the present case.

A crucial aspect of the present case is that both Petitioner and Respondent are political subdivisions of the State of Ohio and each is granted certain rights which are not in conflict inter se. In such an instance,

the intent of the State to create a setting wherein one subdivision might exercise monopoly power over the other, should be clearly evident before a federal court finds an exemption from antitrust liability because of the "state action" doctrine.

The "state action" exemption doctrine originated in Parker v. Brown 317 U.S. 341 (1943) where the State of California's enactment of the Agricultural Prorate Act was alleged to be violative of the Sherman Antitrust Act by preventing raisin growers from freely marketing their goods. It was held, in that case, that Congress had not preempted the regulation of that particular field and, further, that there was no evidence that Congress had intended to restrain the States from engaging in anti-competitive conduct. Accordingly, the Court held that anti-competitive conduct engaged in or directed by the State, as a sovereign act of government, was exempt from federal antitrust law liability. Id. at 350.51. While Parker is still good law

the broad holding has been narrowed and modified over the succeeding years.

The current state of the Parker exemption is the result of this Court's recent decisions in City of LaFayette v. Louisiana Power and Light 435 U.S. 389 (1978) and Community Communications v. City of Boulder 70 L.Ed. 2d 810 (1982). These decisions, like the present case, involved claims of exemption by political subdivisions of the States. The plurality opinion of LaFayette held that Congress did not intend to exempt political subdivisions from Sherman Act liability simply by their status as such and that "the Parker doctrine exempts only anti-competitive conduct engaged in as an act of government by...(these) subdivision, (which is) pursuant to state policy to displace competition with regulation or monopoly public service." City of LaFayette at 411-13. This Court's opinion in Community Communications noted that the LaFayette opinion had been accepted by a majority of the Court in subsequent decisions. (See, New Motor Vehicle

Board of Calif. v. Orrin W. Fox Co. 439 U.S. 96 (1978); Calif. Retail Liquor Dealers Assoc. v. Midcal Aluminum Co. 445 U.S. 97 (1980)). The Court, in Community Communications, adopted a two step test, first articulated in LaFayette, for determining whether a State political subdivision was entitled to the Parker "state action" exemption from antitrust liability.

Community Communications and LaFayette held that political subdivisions could not claim an antitrust Parker exemption unless it could show that the charged conduct engaged in was "pursuant to state policy to displace competition with regulation or monopoly public service". LaFayette at 413. In addition, the political subdivision must show that the "state policy" relied upon was "clearly articulated and affirmatively expressed" by the State Legislature. Id at 413, Community Communications at 815. The meaning of this two-part test, concisely stated is "that when the State itself has not directed or authorized an anti-competitive practice, the State's subdivisions

in exercising their delegated power must obey the antitrust laws". LaFayette at 416.

The above standard was purportedly followed in the decisions below in this case in favor of Respondent. It is Petitioner's request that this Court examine the decision of the Sixth Circuit Court of Appeals to determine if it, in fact, is a faithful adherance to the Community Communications test. The lower courts were faced with the task of determining the intent of the Ohio Legislature in enacting Ohio Revised Code Section 306.30 et seq. and 306.70 and .71 and whether the Legislature intended to create a monopoly in the bus service field in the State of Ohio. In such a case, "the district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of the legislative intent". City of LaFayette v. Louisiana Power and Light (5th Cir. Ct. of Appl. 1976) 532 F. 2d 434, 435. Petitioner contends that the lower courts failed to examine all of the relevant evidence and, instead, applied a less

stringent test completely unwarranted by this Court's decisions.

The lower courts had before them two authorative statements of the "state policy" of Ohio. The first was Article XVIII, Section 4 of the Ohio Constitution, the Home Rule amendment, which expressly grants to Ohio municipalities the right to operate public utilities within their own territorial boundaries and surrounding areas. A bus line is a public utility within the meaning of Article XVIII, Section 4. (See, Cleveland Railway Co. v. Village of North Olmsted 130 Ohio St. 144, 198 N.E. 41 (1935)). Further, it is well established, under Ohio case law, that in enacting legislation regulating public utilities, the Legislature may not interfere with the constitutionally protected right of Ohio municipalities to own and operate utilities of their own. (See, Columbus v. Public Utility Commission 58 Ohio St. 2d 427, 390 N.E. 2d 1201 (1974); Columbus v. Teater 53 Ohio St. 2d 253, 374 N.E. 2d 154 (1978) and

Canton v. Whitman 44 Ohio St. 2d 62, 337 N.E. 2d 766 (1975)). Moreover, in a case dealing with an attempt to regionalize water utility service, also a public utility, a recent Ohio Court decision held that since the Ohio Constitution granted municipalities the right to operate and own public utilities, the State Legislature could not, and would not be presumed to have, enacted a legislative scheme for the creation of regional utilities empowered to deprive municipalities of their Constitutional right to run their own utilities. Seven Hills, et al. v. Cleveland 1 Ohio App. 3d 84, 493 N.E. 2d 895 (Ct. App. 1980).

The other evidence of Ohio's "state policy" was the content and language of Ohio Revised Code Section 306.30 et seq. and 306.70 and .71. These Sections allow for the formation of regional transit authorities through joint legislative action (O.R.C. Section 306.32, Appendix B. infra, page 5); through voluntary inclusion (O.R.C. Section 306.321, Appendix B, infra, page 8); or through voluntary

modification and even dissolution (O.R.C. Section 306.54, Appendix B, infra, page 35). Moreover, the Legislature provided that such an authority was empowered to enter into and supervise franchise agreements for the operation of bus service (O.R.C. Section 306.35(O), Appendix B., infra, page 30). The Legislature also contemplated that such an authority would provide by agreement with, among others, municipalities fro the "acquisition, maintenance and operation of transit facilities" (O.R.C. Section 306.35(M), Appendix B, infra, page 30). Further, the Legislature denied these authorities any right to exercise the power of eminent domain to acquire any transit franchises belonging to a municipal corporation without that municipality's consent.

The District Court, after citing the relevant case law authority, purported to apply the "state action" exemption test as stated in LaFayette, supra. The District Court's decision failed to apply that test correctly. The Court held that:

> When the statutes are examined in detail it is equally clear that the Ohio legislature was not ignorant of the possibility that a municipally owned transit system would either fail or be absorbed upon the formation of a regional transit authority within the county in which that municipality was located. Accordingly, this court holds that the GCRTA, by engaging in the conduct which is the subject of North Olmsted's complaint, is acting under authority granted it by the Ohio legislature and that the legislature contemplated the kind of conduct of which North Olmsted complains". (Emphasis added.)

(See, Memorandum of Opinion, Appendix A, infra, at page 13).

The Court of Appeals for the Sixth Circuit applied the test similarly, holding that:

> "...the actions of GCRTA alleged in North Olmsted's complaint were contemplated and authorized by state law and constituted state or state subdivision action in furtherance of 'affirmatively expressed state policy.' ...The alleged anti-competitive conduct of GCRTA was engaged in pursuant to a clearly articulated state policy expressed by legislative action creating regional or countywide, transportation authorities."

(See, Sixth Circuit opinion, Appendix A, infra at page 5).

Though both lower courts claim to be applying the LaFayette/Community Communications test, in fact they both are using a standard

expressly rejected in those cases. It is clear from the relevant Ohio statutes that the State is neutral as regards the formation and operation of regional transit authorities. Formation is voluntary as is dissolution. The operation may be carried out by a central authority, by franchise, or by operating agreements with local municipalities. The statutes hardly envision a "state policy" to replace competition with monopoly and even more clearly, there is no affirmative expression of that policy. The State of Ohio is merely neutral in this matter, it allows regional authorities across the state significant independence in determining their own mode of operation. The lower court's decision holds that this independence shows an intent by the state to allow anti-competitive conduct and, therefore, anti-trust exemption is warranted. Such a holding flies in the face of this court's reasoning in Community Communications. There this Court expressly denied such analysis and stated:

> "Thus on respondent's view, Boulder can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free market competition and all of these policies are equally 'contemplated', and 'comprehended within the powers granted'. Acceptance of such a proposition -- that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anti-competitive ordinances -- would wholly evisicerate the concepts of 'clear articulation and affirmative expression' that our precedents require."

Community Communications, supra at 817

The lower court's decisions holding that enactments of the Ohio Legislature, neutral and consensual on their face, especially so when viewed in light of the relevant Ohio Constitutional provisions, are a sufficient basis for a finding of a "state action" exemption, clearly conflict with this Court's decisions in this area. To allow such a decision to stand as precedent in the jurisdiction of the Sixth Circuit would throw into confusion once again the whole area of the "state action" exemption which this Court attempted to finally clarify in Community

Communications. The present case contains clear and simple facts as well as general and neutral state statutes. The issue in the case is uncluttered by collateral matters and is ripe for this Court's review.

II. THE DECISION BELOW PRESENTS AN IMPORTANT FEDERAL QUESTION OF ANTITRUST LIABILITY BETWEEN LOCAL AND REGIONAL GOVERNMENTAL BODIES WHICH IS OF NATIONAL IMPORTANCE AND PUBLIC CONCERN.

Clearly, the question presented is of importance to all states in their attempt to provide comprehensive service to their citizens without unduly infringing on the rights of local political subdivisions to supply those services themselves pursuant to "Home Rule" powers. The Court, interpreting Congressional enactments, has held that a State is immune from antitrust liability if it affirmatively expresses a clear policy to offer monopoly services to the public. The question in this case is whether the State, simply by providing a mechanism for the voluntary formation of regional authorities, can implicitly allow thes authorities unlimited

power to engage in anti-competitive conduct, unchecked by State constitutional provision or federal antitrust law.

If this Court allows such a precedent to exist, the impact on local governmental independence could be highly damaging. The growth of local power in Ohio, as in many other states, was the result of historical inefficiency, corruption or unresponsiveness from the state legislature. In order to combat these problems and to better serve local citizenry, the Ohio Constitution was amended to grant municipalities the right to self-legislate matters of local concern. In the realm of local concern were matters such as transit service, water and sewer service, utility supplies and recreational and cultural matters. In Ohio, as elsewhere, these matters are just the ones which are now being combined in regional authorities such as that at issue in the present case.

The decision in the lower courts would in Justice Rhenquist's words in his dissent in

Community Communication, supra at 820, "destroy the home rule movement in this country through which local governments have obtained, not without persistent state opporition, a limited autonomy over matters of local concern". The interest of the various States in limiting local power is evidenced, as noted by Justice Rhenquist, Id., by the fact that 22 States joined as amicus curiae in Community Communications, supra. It is crucial that this Court clearly affirm its prior decisions by reversing the lower courts' holding which establishes a "state action" exemption from antitrust liability where the state has simply permitted the voluntary formation of a regional authority. Allowing the lower courts' decision to stand in this case will permit States to circumvent the Home Rule powers of municipalities by the simple expedient of enacting regional authority legislation, even where it directly conflicts with State constitutional provision and the intent of the framers of the federal antitrust laws.

Conclusion

Petitioner requests that this Court issue a writ of certiorari to the Sixth Circuit Court of Appeals to review its decision in this case. This Court has clearly stated the standard by which to judge the propriety of granting a political subdivision of a State, a Parker, "state action" exemption from antitrust liability. The standard, articulated in LaFayette and Community Communications, supra, requires a showing of a state policy to replace competition with monopoly, which policy must be clearly articulated and affirmatively expressed. Moreover, the activities of an anti-competitive nature must have been contemplated by the State. Although the lower courts cited the above standard, in fact they were not applied. The lower court adopted a standard which provides for an exemption simply by the

enactment of general, neutral legislation which on its face neither permits nor contemplates the charged anti-competitive conduct. Such a standard conflicts with the controlling precedent of this Court and presents important federal questions of national importance. For the foregoing reasons, Petitioner respectfully urges this Court to grant its Petition for a writ of certiorari.

Respectfully submitted,

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Certificate of Service

Three copies of the foregoing Petition for a writ of certiorari have been sent via U.S. mail, pursuant to Rule 28 of the Supreme Court Rules, to:

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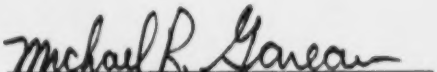
this 1st day of March, 1984



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